

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANDREW L. JORDAN,

Plaintiff,

v.

PLAZA HOME MORTGAGE, INC., et al.,

Defendants.

3:11-cv-348-RCJ-WGC

ORDER

Currently before the Court is a motion for summary judgment (#45) and a motion to expunge lis pendens (#46). For the following reasons, the Court denies both the motion for summary judgment (#45) and the motion to expunge lis pendens (#46).

BACKGROUND

I. Facts

Plaintiff Andrew L. Jordan executed a note secured by a deed of trust on a piece of property located at 8707 Malibu Drive, Reno, Nevada 89506, which was recorded in Washoe County on September 11, 2008. (Deed of Trust (#45-1) at 5-6). The mortgage, dated September 8, 2008, was for \$207,264. (*Id.*). The deed of trust named Plaza Home Mortgage, Inc. as lender, First American Title as trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender and beneficiary.¹ (*Id.* at 5).

On September 15, 2008, Plaza Home Mortgage sent Plaintiff a letter stating that it had sold his loan to Countrywide Home Loans, Inc. and that all payments should be sent to

¹ Despite the wording of the deed of trust, MERS is not a beneficiary to the deed of trust. See *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650, at *2 (D. Nev. 2009).

1 Countrywide Home Loans. (Transfer Letter (#7-7) at 2). On April 1, 2009, Plaintiff defaulted
2 on his mortgage payments for an unspecified amount. (See Notice of Default (#7-8) at 2).

3 On March 1, 2010, Recontrust Company, N.A. executed a notice of default and election
4 to sell under the deed of trust.² (Notice of Default (#7-8) at 2-3). Charlotte Olmos—an
5 employee of First American Title Insurance Company, allegedly an agent for
6 Recontrust—signed the notice of default. (*Id.* at 3).

7 On March 3, 2010, MERS executed an assignment of the deed of trust to BAC Home
8 Loans Servicing LP (“BAC”), formerly known as Countrywide Home Loans Servicing, LP.
9 (Assignment of Deed of Trust (#20-9) at 2). On that same day, BAC executed a substitution
10 of trustee substituting Recontrust as trustee of the deed of trust in place of First American
11 Title. (Substitution of Trustee (#20-10) at 2-3).

12 On September 9, 2010, First American National Default recorded a certificate from the
13 Nevada Foreclosure Mediation Program indicating that no request for mediation had been
14 made or that the grantor had waived mediation. (Mediation Certificate (#20-12) at 2). The
15 certificate stated that the beneficiary could proceed with the foreclosure process. (*Id.*). That
16 same day, Recontrust filed a notice of trustee’s sale with the Washoe County Recorder’s
17 office. (Notice of Trustee’s Sale (#7-9) at 2). On December 27, 2010, Recontrust filed another
18 notice of trustee’s sale with the Washoe County Recorder’s office. (Second Notice of
19 Trustee’s Sale (#7-10) at 2). On April 11, 2011, Plaintiff recorded a notice of lis pendens with
20 the Washoe County Recorder’s office. (Notice of Lis Pendens (#20-15) at 2-3). No
21 foreclosure sale has taken place. (See Mot. for Summ. J. (#45) at 3).

22 **II. Complaint**

23 In May 2011, Plaza Home Mortgage filed a petition for removal and attached Plaintiff’s
24 complaint from the Second Judicial District in Washoe County. (Pet. for Removal (#1);
25 Compl. (#1-1) at 10-74). In the complaint, Plaintiff sued Plaza Home Mortgage, Inc.; First
26

27 ² Recontrust recorded the notice of default on March 3, 2010. (Notice of Default (#7-8)
28 at 2).

1 American Title; Recontrust Company, N.A.; BAC Home Loans Servicing, LP; First American
 2 Title Insurance Company; and Charlotte Olmos. (Compl. (#1-1) at 10). Plaintiff's 66-page
 3 complaint listed nine causes of action, including: (1) debt collection violations under NRS §
 4 649.370; (2) unfair and deceptive trade practices under NRS § 598.0923; (3) unfair lending
 5 practices under NRS § 598D.100; (4) violation of the covenant of good faith and fair dealing;
 6 (5) violation of NRS § 107.080; (6) quiet title; (7) fraud in the inducement and through
 7 omission; (8) slander of title; and (9) abuse of process. (*Id.* at 37-71).

8 Plaza Home Mortgage filed a motion to dismiss on May 25, 2011 and Recontrust and
 9 BAC filed a motion to dismiss on June 16, 2011. (Mots. to Dismiss (##7, 20)). First American
 10 Title Insurance Company and Charlotte Olmos later joined in both of these motions to dismiss.
 11 (Joinders (##13, 22)). On October 7, 2011 the Court granted these motions on all claims
 12 except for claim five for violations of NRS § 107.080 and claim six for quiet title. (Order (#36)
 13 at 7). The Court held that Plaintiff had stated a claim on claims five and six because
 14 Recontrust executed the notice of default before it had properly been substituted as trustee,
 15 and therefore had no authority to initiate the foreclosure process. (*Id.*).

16 Recontrust and BAC (collectively "Defendants") filed a motion for summary judgment
 17 and a motion to expunge lis pendens on May 31, 2012. (Mot. for Summ. J. (#45); Mot. to
 18 Expunge Lis Pendens (#46)).

19 LEGAL STANDARD

20 The purpose of summary judgment is to dispose of factually unsupported claims and
 21 defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A court must grant
 22 summary judgment when "the movant shows that there is no genuine dispute as to any
 23 material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).
 24 A fact is material if it may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477
 25 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence
 26 for a reasonable jury to return a verdict for the nonmoving party. *Id.*

27 When presented with a motion for summary judgment, the court employs a burden-
 28 shifting analysis. When the moving party would bear the burden of proof at trial, it must

1 present evidence “which would entitle it to a directed verdict if the evidence went
2 uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474,
3 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)). In such
4 circumstances, “the moving party has the initial burden of establishing the absence of a
5 genuine issue of fact on each issue material to its case.” *Id.* In contrast, when the nonmoving
6 party would bear the burden of proving the claim or defense, the moving party may satisfy its
7 burden in two ways: (1) by presenting evidence which negates an essential element of the
8 nonmoving party’s case; or (2) by demonstrating that the nonmoving party has failed to make
9 a showing sufficient to establish an essential element to that party’s case on which that party
10 would bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323-24. If the moving
11 party fails to satisfy its initial burden, the court must deny the motion for summary judgment
12 and need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*, 398
13 U.S. 144, 159-60 (1970).

14 If the moving party meets its initial burden, the burden will then shift to the opposing
15 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co.*
16 *v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To show a genuine issue of material fact,
17 the opposing party is not required to establish a material issue of fact conclusively in its favor.
18 Rather, it is sufficient that “the claimed factual dispute be shown to require a jury or judge to
19 resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec.*
20 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting *First Nat’l Bank of Ariz. v. Cities*
21 *Serv. Co.*, 391 U.S. 253, 288-89 (1968)). In essence, the nonmoving party cannot avoid
22 summary judgment by solely relying on conclusory allegations that are unsupported by factual
23 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The opposition must go beyond
24 the allegations and assertions of the pleadings and set forth specific fact by providing the court
25 with competent evidence that establishes a genuine issue for trial. FED. R. CIV. P. 56(e);
26 *Celotex Corp.*, 477 U.S. at 324.

27 At the summary judgment stage, the court is not to weigh the evidence and determine
28 the truth, but rather to determine whether there is a genuine issue for trial. See *Anderson*, 477

1 U.S. at 249. The evidence of the nonmovant must be believed, and all justifiable inferences
2 drawn in his favor. *Id.* at 255. If the evidence of the nonmoving party is simply colorable or
3 it is not significantly probative, summary judgment may be granted. See *id.* at 249-50.

4 DISCUSSION

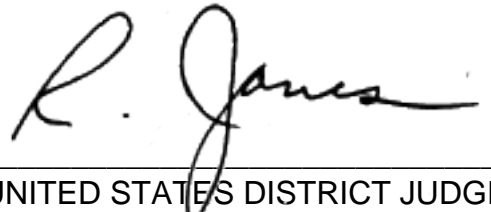
5 Defendants have filed a motion for summary judgment on the two remaining claims
6 against them: claim five for violations of NRS § 107.080 and claim six for quiet title. (Mot. for
7 Summ. J. (#45) at 5). The Court previously held that Plaintiff had stated a claim for violation
8 of NRS § 107.080 and quiet title because Recontrust executed the notice of default before it
9 had been properly substituted as trustee. (Order (#36) at 7). Defendants have now presented
10 the declaration of Lorena Diaz—the Assistant VP Operations Team Lead for Bank of America,
11 N.A., successor by merger to BAC—asserting that BAC, in its capacity as servicer of the note,
12 authorized Recontrust to initiate non-judicial foreclosure proceedings on February 23, 2010.
13 (Diaz Decl. (#45-1) at 2-3).

14 The Diaz declaration establishes that BAC was the servicer of the loan and that it
15 properly authorized Recontrust to initiate the foreclosure process. (Diaz Decl. (#45-1) at 3).
16 However, the notice of default was not executed by Recontrust, but by First American Title
17 Insurance Company as agent of Recontrust. (Notice of Default (#7-8) at 2-3). Although
18 Defendants have provided this Court with evidence that Recontrust had authority from BAC
19 to initiate the foreclosure process, no evidence has been presented that First American Title
20 Insurance Company had authority from Recontrust to execute the notice of default. As
21 Defendants have presented no evidence of the agency relationship between First American
22 Title Insurance Company and Recontrust, they are not entitled to summary judgment on claim
23 five for violations of NRS § 107.080 and claim six for quiet title.

24 CONCLUSION

25 For the foregoing reasons, IT IS ORDERED that both the motion for summary judgment
26 (#45) and the motion to expunge lis pendens (#46) are DENIED.

27 DATED: This 6th day of September, 2012.

28 
5 UNITED STATES DISTRICT JUDGE